

## Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
<b>SERIAL NUMBER</b>	79116397
<b>LAW OFFICE ASSIGNED</b>	LAW OFFICE 110
<b>MARK SECTION (no change)</b>	
<b>ARGUMENT(S)</b>	
Please see the actual argument text attached within the Evidence section.	
<b>EVIDENCE SECTION</b>	
<b>EVIDENCE FILE NAME(S)</b>	
<b>ORIGINAL PDF FILE</b>	<a href="#">evi_4537320-094350410_.BPF_final_ROA.pdf</a>
<b>CONVERTED PDF FILE(S) (5 pages)</b>	<a href="#">\\TICRS\EXPORT16\IMAGEOUT16\791\163\79116397\xml18\RFR0002.JPG</a>
	<a href="#">\\TICRS\EXPORT16\IMAGEOUT16\791\163\79116397\xml18\RFR0003.JPG</a>
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<b>GOODS AND/OR SERVICES SECTION (001)(no change)</b>	
<b>GOODS AND/OR SERVICES SECTION (041)(no change)</b>	
<b>GOODS AND/OR SERVICES SECTION (042)(current)</b>	
<b>INTERNATIONAL CLASS</b>	042
<b>DESCRIPTION</b>	
Scientific and technological services, namely, modular pretreatment and biorefinery services, fermentation processes, downstream processing and separation technology services, and bioconversion processes in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals and scientific research and design relating thereto in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; industrial chemical analysis and research services in the field of biobased chemicals and in	

the field of development of processes for the manufacture of biobased chemicals; technical advice and consultancy; research and development of new products for third parties in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; chemical research in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals

#### **GOODS AND/OR SERVICES SECTION (042)(proposed)**

**INTERNATIONAL  
CLASS**

042

#### **TRACKED TEXT DESCRIPTION**

~~Scientific and technological services, namely, modular pretreatment and biorefinery services, fermentation processes, downstream processing and separation technology services, and bioconversion processes in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals and scientific research and design relating thereto in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals;~~ Scientific and technological services, namely, analysis, testing, and upscaling in the field of modular pretreatment and biorefinery, fermentation processes, downstream processing and separation technology bioconversion processes related to biobased chemicals and development of processes for the manufacture of biobased chemicals; industrial chemical analysis and research services in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; ~~technical advice and consultancy;~~ technical advice and consultancy relating to the development of processes for the upscaling of biobased chemicals and to biobased chemicals; research and development of new products for third parties in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; chemical research in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals

#### **FINAL DESCRIPTION**

Scientific and technological services, namely, analysis, testing, and upscaling in the field of modular pretreatment and biorefinery, fermentation processes, downstream processing and separation technology bioconversion processes related to biobased chemicals and development of processes for the manufacture of biobased chemicals; industrial chemical analysis and research services in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; technical advice and consultancy relating to the development of processes for the upscaling of biobased chemicals and to biobased chemicals; research and development of new products for third parties in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; chemical research in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals

#### **SIGNATURE SECTION**

**RESPONSE  
SIGNATURE**

/jmh/

**SIGNATORY'S NAME**

Jennifer M. Hetu

**SIGNATORY'S  
POSITION**

Attorney of Record, Michigan Bar Member

**SIGNATORY'S PHONE  
NUMBER**

248-566-8452

<b>DATE SIGNED</b>	10/04/2013
<b>AUTHORIZED SIGNATORY</b>	YES
<b>CONCURRENT APPEAL NOTICE FILED</b>	NO
<b>FILING INFORMATION SECTION</b>	
<b>SUBMIT DATE</b>	Fri Oct 04 10:18:51 EDT 2013
<b>TEAS STAMP</b>	USPTO/RFR-4.53.73.20-2013 1004101851788387-79116397 -500937e215a53dceec230409 6f212ef906a7ba27356561484 e7672566db9cb5faa4-N/A-N/ A-20131004094350410874

PTO Form 1930 (Rev 9/2007)  
OMB No. 0651-0050 (Exp. 05/31/2014)

## Request for Reconsideration after Final Action To the Commissioner for Trademarks:

Application serial no. **79116397** has been amended as follows:

### ARGUMENT(S)

**In response to the substantive refusal(s), please note the following:**

Please see the actual argument text attached within the Evidence section.

### EVIDENCE

**Original PDF file:**

[evi\\_4537320-094350410\\_.BPF\\_final\\_ROA.pdf](#)

**Converted PDF file(s) (5 pages)**

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

### CLASSIFICATION AND LISTING OF GOODS/SERVICES

**Applicant proposes to amend the following class of goods/services in the application:**

**Current:** Class 042 for Scientific and technological services, namely, modular pretreatment and

biorefinery services, fermentation processes, downstream processing and separation technology services, and bioconversion processes in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals and scientific research and design relating thereto in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; industrial chemical analysis and research services in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; technical advice and consultancy; research and development of new products for third parties in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; chemical research in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals

Original Filing Basis:

**Filing Basis Section 66(a)**, Request for Extension of Protection to the United States. Section 66(a) of the Trademark Act, 15 U.S.C. §1141f.

**Proposed:**

**Tracked Text Description:** ~~Scientific and technological services, namely, modular pretreatment and biorefinery services, fermentation processes, downstream processing and separation technology services, and bioconversion processes in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals and scientific research and design relating thereto in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals;~~ Scientific and technological services, namely, analysis, testing, and upscaling in the field of modular pretreatment and biorefinery, fermentation processes, downstream processing and separation technology bioconversion processes related to biobased chemicals and development of processes for the manufacture of biobased chemicals; industrial chemical analysis and research services in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; ~~technical advice and consultancy;~~ technical advice and consultancy relating to the development of processes for the upscaling of biobased chemicals and to biobased chemicals; research and development of new products for third parties in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; chemical research in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals

Class 042 for Scientific and technological services, namely, analysis, testing, and upscaling in the field of modular pretreatment and biorefinery, fermentation processes, downstream processing and separation technology bioconversion processes related to biobased chemicals and development of processes for the manufacture of biobased chemicals; industrial chemical analysis and research services in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; technical advice and consultancy relating to the development of processes for the upscaling of biobased chemicals and to biobased chemicals; research and development of new products for third parties in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals; chemical research in the field of biobased chemicals and in the field of development of processes for the manufacture of biobased chemicals

**Filing Basis Section 66(a)**, Request for Extension of Protection to the United States. Section 66(a) of the Trademark Act, 15 U.S.C. §1141f.

**SIGNATURE(S)**

**Request for Reconsideration Signature**

Signature: /jmh/ Date: 10/04/2013

Signatory's Name: Jennifer M. Hetu

Signatory's Position: Attorney of Record, Michigan Bar Member

Signatory's Phone Number: 248-566-8452

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is not filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 79116397

Internet Transmission Date: Fri Oct 04 10:18:51 EDT 2013

TEAS Stamp: USPTO/RFR-4.53.73.20-2013100410185178838

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This is in response to the final Office Action issued April 4, 2013 related to Application No. 79116397 for the mark BPF (“Applicant’s Mark”). In the final Office Action, the Examining Attorney withdrew the Section 2(d) Likelihood of Confusion refusal related to U.S. Reg. No. 4115169, and accepted the amended identification of goods in part.

However, the Examining Attorney maintained a partial refusal to register Applicant’s Mark on the basis of a likelihood of confusion with U.S. Reg. No. 783312 for the mark BFP for “sour flavoring ingredient used in the production of bakery products such as bread” in Class 30 and 925995 for the mark BFP & Design for “for dough conditioners, emulsifiers, icing and flavoring ingredients used in the production of bakery products such as bread and sweet goods” in Class 30, both owned by Caravan Ingredients, Inc. (collectively, the Cited Marks”). The Examining Attorney also maintained the identification of goods requirement in part.

Applicant has amended its identification of goods as part of its response. However, Applicant respectfully disagrees with the likelihood of confusion refusal related to the Cited Marks, and requests that the refusal be withdrawn. Applicant has filed a Notice of Appeal in connection with this Request for Reconsideration.

As an initial matter, please be advised that consent to register was obtained by Caravan Ingredients, Inc. and a signed consent letter will follow. Additionally, the Examining Attorney should be aware that both Applicant and Caravan Ingredients, Inc. are both owned by the same parent entity company.

Further, an additional review of the applicable *DuPont* factors establishes why there is no likelihood of confusion, mistake, or deception between Applicant’s Mark and the Cited Marks.

#### **DuPont Factors – Comparison of the Marks**

The Examining Attorney has violated a basic trademark examination principle in articulating likelihood of confusion, namely, the Examining Attorney improperly dissected Applicant’s Mark and the Cited Marks. “[M]arks must be compared in their entirety. ... It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark (footnote omitted).” TMEP § 1207.01(b), quoting *In re National Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 750-51 (Fed. Cir. 1985).

Dissection of a mark is improper because it is an accepted tenet of trademark law that marks must be viewed in their entirety when conducting a likelihood of confusion analysis. The Supreme Court has held, and it is an accepted tenet of trademark law, that marks must be viewed in their entirety when conducting a likelihood of confusion analysis. “[T]he commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail.” *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538 (1920).

The Examining Attorney separately extracted each letter, namely, “B” “P” and “F”, from the marks and examined the individual letters in a vacuum for purposes of a likelihood of confusion refusal. The Examining Attorney concluded that because Applicant’s Mark and the Cited Marks share these letters, a likelihood of confusion exists. Further, the Examining Attorney eliminated the distinctive stylization and design element found in Reg. No. 925995, shown below.



This constitutes improper dissection. Because of the improper dissection, the Examining Attorney gave no weight whatsoever to the distinct commercial impression imparted by each mark, as well as the differences in sound and appearance between Applicant's Mark and the Cited Marks.

Applicant's Mark and the Cited Marks cannot be broken apart for purposes of examination, and doing so fundamentally changes the nature of each mark. Accordingly, it appears that the Examining Attorney chose to separately examine each letter solely for the purpose of justifying a likelihood of confusion refusal. When viewed as a whole, there are more differences between Applicant's Mark and the Cited Marks than there are similarities.

Further, the mere identification of common elements in two marks does not mean that a likelihood of confusion exists. *Source Services Corp. v. Chicagoland JobSource, Inc.*, 1 U.S.P.Q.2d 1048 (N.D. Ill. 1986). "When considering the similarities of the marks '[a]ll relevant factors pertaining to the appearance and connotation must be considered.'" TMEP § 1207.01(b). *See Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 U.S.P.Q.2d 1894, 1897 (Fed. Cir. 2000). The mere similarity or even identity between the two marks can never alone be decisive of likelihood of confusion. *McGregor-Donniger, Inc. v. Drizzle, Inc.*, 202 U.S.P.Q. 81, 89 (2<sup>nd</sup> Cir. 1979). Thus, in holding the mark "DRIZZLE" for women's overcoats was not likely to cause confusion with "DRIZZLER" for golf jackets, the Court of Appeals for the Second Circuit stated:

First, even close similarity between two marks is not dispositive of the issue of likelihood of confusion. "Similarity in and of itself is not the acid test. Whether the similarity is likely to provoke confusion is the crucial question." Callman § 82.1(a), at 601-02 (footnote omitted). For this reason cases involving the alteration, addition or elimination of only a single letter from the old mark to the new reach divergent results.

*McGregor-Donniger, Inc. v. Drizzle, Inc.*, 202 U.S.P.Q. 81, 89 (2<sup>nd</sup> Cir. 1979), citing *E.I. DuPont de Nemours & Co. v. Yoshida Internat'l, Inc.*, supra, 393 F.Supp. at 511-12, 185 USPQ at 604-605. In this case, Applicant's Mark is clearly more dissimilar to the Cited Marks than the applicant's mark and the cited mark in the *McGregor-Donniger* case.

In comparing the relevant factors in the present case, it is evident that when Applicant's Mark and the Cited Marks are viewed in their entirety, they are very dissimilar in appearance, sensory impression, connotation, and commercial impression and not likely to result in confusion.

The Examining Attorney's determination that Applicant's Mark is similar the Cited Marks is based solely on the fact that the marks share the letters "B" "P" and "F." However, such minor similarities are greatly outweighed by the dissimilar and distinguishable elements contained in

Applicant's Mark and the Cited Marks. Each mark must be reviewed and examined as a whole. Applicant's Mark is comprised of the exact order of the letters as they appear in Applicant's name – i.e., **Bioprocess Pilot Facility**. On the other hand, the Cited Marks appear to randomly utilize these letters. Further, Reg. No. 925995 utilizes a distinct stylization and design element, as shown above. As such, each mark is more than the sum of its parts, and when each mark is viewed as a whole there are distinct differences in appearance, sound, connotation, and commercial impression between the marks.

Applicant's Mark "evoke[s] a very different image in the minds of relevant consumers" than the Cited Marks, thus creating a visually stronger term. *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 4714 U.S.P.Q.59 (Fed. Cir. 1998).

It is these individual aspects that collectively create the differences in the overall impression made by each mark. The visual distinctions between Applicant's Mark and the Cited Marks create unquestionably different commercial impressions, thereby precluding a finding of likelihood of confusion and favoring the registration of Applicant's Mark. *See Odom's Tennessee Pride Sausage Inc. v. FF Acquisition LLC*, 93 USPQ2d 2030 (Fed. Cir. 2010).

In summary, in refusing registration, the Examining Attorney improperly dissected Applicant's Mark and the Cited Marks, and failed to give proper consideration to each mark in their entirety. When taken as a whole, there are distinct differences in appearance, sound, connotation, and commercial impression between the marks. As a result, Applicant's Mark and the Cited Marks convey very different and separable commercial impressions. Therefore, Applicant's Mark is readily distinguishable and not similar to the Cited Marks.

#### **DuPont Factors – Comparison of the Goods**

Applicant notes that the Examining Attorney has limited the Section 2(d) Refusal to Applicant's goods in Class 1 only.

Nonetheless, as shown above, based on the comparison of the marks alone, the refusal cannot stand; however, additional consideration must be given to all the circumstances surrounding the sale of the goods/services, including marketing channels, the class of prospective purchasers and the degree of similarity between the respective goods/services. *See Industrial Nucleonic Corp. v. Hinde Engineering Co.*, 177 U.S.P.Q. 386 (C.C.P.A. 1973).

In the final Office Action, the Examining Attorney relies solely on approximately 150 pages of third-party registrations to support the claim that Applicant's goods and the goods covered by the Cited Marks are related. The Examining Attorney provided no real world evidence showing that the goods are related. Third-party registrations are entitled to little weight on the question of likelihood of confusion because they are "not evidence of what happens in the market place or that customers are familiar with them." *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *see In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); TMEP §1207.01(d)(iii). There are undoubtedly as many if not more examples of registrations for marks in Classes 1 and 30 for which there is no mingling of these goods, which suggests that such goods would be perceived as emanating from separate sources.

The Examiner commits a logical fallacy – an “inductive fallacy” – by submitting only third-party registrations to prove that goods may emanate from a single source. This is mere speculation, not evidence. The sample is too small and not representative, causing an unjustified generalization. There are undoubtedly as many if not more examples of registrations for marks in Classes 32 and 33 for which there is no mingling of these goods, which suggests that such goods would be perceived as emanating from separate sources.

Additionally, as previously indicated, Caravan Ingredients Inc. is a leader in food and bakery ingredients and its BFP product *is used as an ingredient in baking*. See Ex A, March 13, 2013 Office Action. In contrast, Applicant operates an open access facility where other companies, universities, and others institutions can execute their scale-up research on bioprocesses. Applicant’s basic objective is to help understand bioplastic trends and innovations and thus accelerate those innovations. See Ex. C, March 13, 2013 Office action. Applicant’s goods are specifically marketed to researchers, inventors, and educators. It is very clear that Applicant and Caravan Ingredients are engaged in fundamentally different business activities that are marketed to very different consumers. Accordingly, confusion between the Applicant’s Mark and the Cited Marks is highly unlikely.

Applicant’s goods as amended and goods offered under the Cited Marks are in vastly different channels of trade. Applicant’s goods and the goods covered by the Cited Marks are different and confusion between the goods is extremely unlikely. Even if the Examining Attorney believes that Applicant’s goods and cited goods fall into the same broad category of “chemicals” or “ingredients” each of the goods falls in a distinct sector of the broad category sufficiently unrelated that consumers are not likely to assume the goods originate from the same source. See *Checkpoint Systems Inc. v. Check Point Software Technologies Inc.*, 60 USPQ2d 1609 (3d Cir. 2001); *W.W.W. Pharmaceutical Co. Inc. v. The Gillette Co.*, 25 USPQ2d 1593 (2d Cir. 1993). As previously indicated, there are significant differences in the parties’ marketing channels, and the channels of trade in which consumers are likely to encounter the goods are very different. Confusion as to source or association is highly unlikely as a result of the manner in which consumers purchase the goods.

The differences in the specific nature of the parties’ respective goods are an important factor in the likelihood of confusion analysis, and must be given due consideration. An analysis of the actual relationship of the goods based on their individual characteristics is always required, and **it is not proper to lump different goods into a broad category** (such as the “chemicals” and “ingredients”) and then hold the different goods to be “related” automatically as a result. See *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 198 U.S.P.Q. 151 (C.C.P.A. 1978).

Consumer confusion is not likely to result in the marketplace given the differences in the presentation of the respective goods, and consumers’ ability to distinguish the marks and goods because they “have become educated to distinguish between different marks on the basis of minute distinctions.” *Standard Brands, Inc. v. RJR Foods, Inc.*, 192 U.S.P.Q. 383 (TTAB 1976). In comparing the products in the marketplace, confusion is highly unlikely due to context in which consumers will encounter and perceive Applicant’s Mark and the Cited Marks. It is highly unlikely the consumer would encounter Applicant’s goods and the goods covered by the Cited Marks on the same webpage or side-by-side. More specifically, a side-by-side comparison of conflicting marks is improper if that is not the way buyers see the services presented in the

market. *G.D. Searle & Co. Chas. Pfizer & Co.*, 265 F.2d 385, 121 U.S.P.Q. 74 (7<sup>th</sup> Cir. 1959), cert. denied, 361 U.S. 819, 4 L. Ed. 2d 65, 80 S. Ct. 64, 123 U.S.P.Q. 590 (1959); *Plough, Inc. v. Kreis Laboratories*, 314 F.2d 635, 136 U.S.P.Q. 560 (9<sup>th</sup> Cir.) 1963); *Joahnn Maria Farinia Gegenuber Dem Julichs-Platz v. Chesebrough-Pond, Inc.*, 470 F.2d 1385, 176 U.S.P.Q. 1999 (C.C.P.A. 1972) (court must focus on the “general recollection” produced by the marks, not a side-by-side comparison.)

In summary, Applicant and the owner of the Cited Marks are engaged in fundamentally different business activities targeted towards extremely different customer bases, and the goods provided by each entity are offered in vastly different channels of trade. As such, confusion as to source or association of the goods offered under each mark is highly unlikely.

### **Conclusion**

Under the Lanham Act, a refusal to register under likelihood of confusion requires that such confusion as to the source of the goods/services must not be merely possible, but likely. A mere possibility of confusion is an insufficient basis for refusal under Section 2(d). See *In re Massey-Ferguson, Inc.*, 222 U.S.P.Q. 367, 368 (TTAB 1983). In the case at hand, there is no evidence to support a finding that confusion is likely. Further, the TTAB specifically stated in *In re Massey-Ferguson*: “We are not concerned with mere theoretical possibilities of confusion, deception or mistake or with de minimis situations but with practicalities of the commercial world, with which trademark deals.” *Id.* at 368, quoting *Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 164 U.S.P.Q. 43, 44 (C.C.P.A. 1969).

The overall dissimilarities in the marks, the distinct commercial impression conveyed by Applicant’s Mark and the Cited Marks, and the differences in the underlying goods illustrate that there is less than a mere possibility of confusion in this case. As illustrated above, the mere similarity or even identity between Applicant’s Mark and the Cited Marks is not likely to cause confusion. It would be plainly improper to maintain the refusal.

In conclusion, in refusing registration, the Examining Attorney improperly dissected Applicant’s Mark and the Cited Marks, and failed to give proper consideration to each mark in its entirety. Further consideration of the meaning and the overall commercial impression imparted by Applicant’s Mark, as compared to the meaning and overall commercial impression of the Cited Marks, suggests that Applicant’s Mark is readily distinguishable and not similar to the Cited Marks. Additionally, Applicant’s goods are distinguishable from the goods covered by the Cited Marks. In total, the *DuPont* factors weigh against a finding of likelihood of confusion between Applicant’s Mark and the Cited Marks.

Therefore, the Section 2(d) Likelihood of Confusion Refusal related to the Cited Marks should be withdrawn, and Applicant’s Mark should be allowed to proceed to publication.

Please direct any questions regarding this response to the undersigned attorney for Applicant.